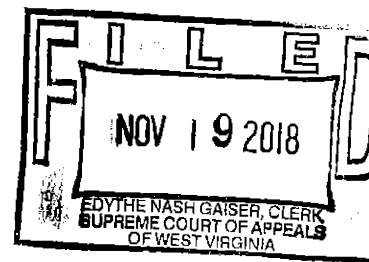


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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**



**State of West Virginia, Plaintiff Below,**

**Respondent**

**Vs.) No. 18 – 0574**

**Alex Holden, Defendant Below,**

**Petitioner.**

**PETITIONER'S REPLY BRIEF**

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## ASSIGNMENTS OF ERROR

1. THE LOWER COURT ERRED BY GRANTING THE STATE'S MOTION TO DISMISS WITHOUT PREJUDICE AS THE PETITIONER WAS PRESENT AND PREPARED FOR TRIAL AND THE DISMISSAL WAS NOT CONSONANT WITH THE PUBLIC INTEREST IN THE FAIR ADMINISTRATION OF JUSTICE AS THE STATE'S ALLEGED INABILITY TO PROCEED TO TRIAL WAS A RESULT OF THEIR OWN LACK OF DILIGENCE.

## STATEMENT OF THE CASE

### A. Procedural History

The Petitioner, Alex Holden, and his co-defendant, Holly M. Miller, were jointly indicted by the State of West Virginia on May 8, 2017, in Wood County Circuit Court Case No: 17-F-168. (App. pps. 3-4). The Indictment charges each Defendant with one count each of Possession with Intent to Deliver a Controlled Substance (heroin) and Possession with Intent to Deliver a Controlled Substance (fentanyl). (App. pps. 3-4). The Indictment also charges each Defendant with one count of Conspiracy for each charge of possession with intent. (App. pps. 3-4).

The alleged drugs were found in plastic baggies inside the underwear of the co-Defendant, Holly Miller, during a traffic stop in Parkersburg on March 1, 2016. (App. pps. 1-2). No drugs were found on Mr. Holden. Subsequent testing of the items seized by the West Virginia State Police revealed only heroin, however, and no fentanyl.

Mr. Holden was arraigned on May 25, 2017 and trial was scheduled for September 6, 2017. (App. p. 5). Ms. Miller was never served or arraigned. That trial was continued to November 14, 2017 on the motion of the State, and over the objection of Mr. Holden, on the ground that they had not yet located Ms. Miller.

On November 6, 2017, Mr. Holden filed his Motion to Sever Defendants so that he could proceed to trial in Ms. Miller's absence on November 14, 2017. (App. p. 8). In that Motion, Mr. Holden, based on previous representations from the State, alleged that Ms. Miller could not be located. However, he soon learned that the State of West Virginia had become aware of her location when they filed their Motion to Continue Trial on November 9, 2017. (App. p. 9). In that Motion, the State moved for a continuance "on the ground that Defendant Holly M. Miller is currently incarcerated in Franklin County, Ohio and will be there until November 28, 2017." (App. p. 6). Her projected release date turned out to be grossly in error and the State of West Virginia had not made an effort under the Agreement on Detainers to procure her for trial.

Both the Motion to Sever and the Motion to Continue were scheduled to be heard on November 13, 2017. (App. p. 9). However, the lower court refused to hear the Motion to Sever because neither Ms. Miller nor her counsel were present and rescheduled the same for January 18, 2018. (App. p. 9). The lower court was not so strict with the State, however. Despite the fact that a motion to continue is a "critical stage of the proceeding" at which a criminal defendant is constitutionally entitled to be present, the lower court overlooked her absence, as well as the absence of her counsel, for the purpose of considering and granting the State's Motion to Continue over Mr. Holden's objection. (App. p. 9).

Although the State of West Virginia was aware no later than November 9, 2017, and perhaps earlier than that, of Ms. Miller's incarceration in Ohio, they had made no effort by November 14<sup>th</sup> to exercise their rights under the Agreement on Detainers codified in West Virginia Code §§ 62-14-1 et seq., to procure her attendance at trial.

The hearing on the Motion to Sever Defendants was heard on January 18, 2018. (App. p. 10). The State of West Virginia objected to the severance and the lower court denied the motion. At that same hearing, the court rescheduled the defendants' trial for April 24, 2018, over three (3) months away. (App. p. 10).

Between November 9, 2018 and April 24, 2018, the State of West Virginia failed to exercise its rights under the Agreement on Detainers to procure Ms. Miller's attendance at trial. As a result, the State filed its Motion to Dismiss without prejudice on April 23, 2018, one day before trial. (App. p. 12). Said Motion stated:

"Came this 22<sup>nd</sup> day of April, 2018, Pat LeFebure Prosecuting Attorney, in and for the State of West Virginia, and moves the Court to dismiss the above styled case. The State is unable to prosecute this Defendant without testimony from his co-defendant Holly Miller. Ms. Miller is incarcerated in Ohio and will not be released until sometime in 2019, therefore the State is unable to proceed at this time.

Whereupon, the state requests this Court to dismiss the above styled case without prejudice based upon Ms. Miller's continued incarceration." (App. p. 14).

A hearing was held on the Motion to Dismiss on April 24<sup>th</sup>, 2018. (App. p. 13) Mr. Holden appeared in person, with Counsel, prepared to proceed to trial. Counsel objected to the Motion and demanded trial but the lower court granted the Motion to Dismiss, without prejudice. (App. p. 13).

In their Motion and during the hearing, the State failed to explain how Ms. Miller's presence would assist them at trial or how they could even utilize her as a witness. No plea agreement had been reached which would allow them to call her as a witness and she was

obviously protected against testifying by her Fifth Amendment right against self-incrimination. Mr. Holden contends that it would not have been beneficial to the State to have her at trial.

#### B. Statement of Facts

On March 1, 2016, Mr. Holden and Ms. Miller traveled in her vehicle together from Columbus, OH to Parkersburg, WV. (App. pps. 1-2). Ms. Miller drove and Mr. Holden rode in the front passenger seat. (App. pps. 1-2). While in Parkersburg, Ptlmn. B.B. Elliot of the Parkersburg Police Department observed Ms. Miller talking on her cell phone while she was driving and initiated a traffic stop. (App. pps. 1-2). While speaking with Ms. Miller, Ofcr. Elliot observed her to be "extremely nervous, with her hands shaking as she attempted to obtain requested information." (App. pps. 1-2). Her hands were shaking profusely, she was breathing heavy and she had fluctuation in her voice when asked simple questions. (App. pps. 1-2).

Officer Elliot noted no such observations regarding Mr. Holden.

Due to Ms. Miller's behaviors, a K-9 unit performed a sniff on the vehicle and made a positive indication. (App. pps. 1-2). A search of Ms. Miller revealed a clear plastic baggy in her underwear containing 15 individually wrapped packages of suspected heroin. (App. pps. 1-2). No drugs or contraband were found on Mr. Holden, just \$312.00 in cash. (App. pps. 1-2)

Subsequently, during questioning and after her arrest, Ms. Miller claimed that Mr. Holden gave her the drugs and told her to put them in her underwear or he would kill her when Officer Elliot initiated the traffic stop. However, Officer Elliot did not make note of any furtive movements in the vehicle which he observed after initiating the stop.

Nevertheless, both Ms. Miller and Mr. Holden were charged as set forth above.

## ARGUMENT

1. **THE LOWER COURT ERRED BY GRANTING THE STATE'S MOTION TO DISMISS WITHOUT PREJUDICE AS THE PETITIONER WAS PRESENT AND PREPARED FOR TRIAL AND THE DISMISSAL WAS NOT CONSONANT WITH THE PUBLIC INTEREST IN THE FAIR ADMINISTRATION OF JUSTICE AS THE STATE'S ALLEGED INABILITY TO PROCEED TO TRIAL WAS A RESULT OF THEIR OWN LACK OF DILIGENCE.**

In relevant part, Rule 48(a) of the West Virginia Rules of Criminal Procedure (R. Cr. P.)

states:

"The attorney for the state may by leave of court file a dismissal of an indictment...and the prosecution shall thereupon terminate..."

"The requirement that a dismissal of criminal charges requires the consent of the court is incorporated into Rule 48(a) of the West Virginia Rules of Criminal Procedure. There is ample federal and state authority for the proposition that under such rule, specific reasons must be given by the prosecutor for the dismissal so that the trial court judge can competently decide whether to consent to the dismissal..." Myers v. Frazier, 173 W.Va. 658, 319 S.E.2d 782 (1984).

"The decision in Myers also held that as a general rule, a trial court should not grant a motion to dismiss criminal charges unless the dismissal is consonant with the public interest in the fair administration of justice. State v. Scott, 233 W.Va. 12, 754 S.E.2d 588 (2014).

"In light of the foregoing law, we conclude that general statements by a prosecutor that a dismissal of criminal charges would effectuate the efficient and proper administration of justice are not specific enough to support the dismissal. Nor is it sufficient for a prosecutor to generally conclude that the case is difficult and might be lost, because uncertainty is inherent in any litigation. What is needed from a prosecutor is a statement of the salient facts and specific reasons that would provide a trial court with some basis for concluding that the dismissal of criminal charges is warranted..." Myers v. Frazier, *infra*.



The State's Response Brief presents two glaring anomalies.

First, the State continues to insist that the prosecutor below had begun the process under the Agreement on Detainers to obtain custody of Ms. Miller for trial despite no evidence to that effect. They also rely on and cite the prosecutor's argument at the hearing on the Motion to Dismiss that: "We're not asking for this case to be put on hold until 2019. In fact, we're attempting to have her returned here so that this case can proceed to trial."

However, the Agreement on Detainers specifically requires that there be "an untried indictment, information or complaint...pending" against the Defendant in order for the receiving state to make a demand for custody of the Defendant for trial. Therefore, once the Indictment herein was dismissed, the State no longer had the right to seek custody of Ms. Miller for trial. The claim that they were attempting to have her returned for trial is wholly inconsistent with the Motion to Dismiss. Furthermore, since they deprived themselves of any further right to obtain custody of Ms. Miller, the practical effect of a dismissal was, in fact, to continue the case until her release from Ohio authorities in 2019.

Second, the State, in its attempt to justify the dismissal, argues that "Here, the State's key witness (also Petitioner's codefendant) was not present on-site and available to testify, but rather incarcerated pending at least the sending state's approval under the Interstate Agreement on Detainers."

However, the State fails to explain how Ms. Miller could possibly have been their witness at that time even if she had been present for trial. They could not have compelled her

to testify since she was a defendant and they had no plea agreement in place under which she was obligated to testify. She was not, as the State claims in its brief, the "State's key witness." At the time of trial, the State had no mechanism by which they could call her as a witness. In addition, her absence was their fault since they had failed to obtain her attendance despite having known of her incarceration in Ohio for over five (5) months.

The State further argues:

"Though the State could have availed itself of the agreement on detainers, this is entirely within the discretion of the State-and, moreover, the State had actually exercised this right and requested Ohio send Ms. Miller to West Virginia but did not secure her presence in time for the April 24, 2018 trial."

Petitioner hereby challenges the State's assertion that it is entirely within the State's discretion to exercise its rights under the Agreement on Detainers.

"Where one indicted for a felony in this State has been incarcerated in another state, the prosecuting authorities in this jurisdiction, pursuant to the provisions of this section, are under a mandatory duty to apply to the authorities of the incarcerating state for temporary custody of said accused for the purpose of offering him a speedy trial and the failure of the state to so act will cause the terms during which he was so imprisoned to be chargeable against the state under §62-3-21." State ex rel. Stines v. Locke, 159 W.Va. 292, 220 S.E.2d 443 (1975).

Therefore, it is readily apparent that the state does not have unfettered discretion in its use of the Agreement on Detainers but actually has a mandatory duty to proceed thereunder. In addition, the State's argument fails to acknowledge the effect which the State's failure had on the Defendant's rights. He was twice denied his right to trial without unreasonable delay and that delay continues to this day. Whatever the purpose of the Agreement on Detainers, Petitioner seriously doubts that the unreasonable delay of his trial is one of them.

As the prosecutor did in her argument at the hearing on the Motion to Dismiss, the State argues in its brief that the State had begun the process of getting Ms. Miller here from Ohio for trial. It is now November, 2018, some seven months after that hearing. Where is she? Petitioner realizes the anomaly here that they couldn't have obtained her since the Indictment was dismissed, but where is the new Indictment? None has been returned and Ms. Miller has not been produced for trial. Actions speak louder than words and the State's actions evince no intent whatsoever to try Ms. Miller or even re-indict her. The fact is, three terms of court (September, 2017; January 2018 and May 2018) have passed since the term of indictment and she is entitled to discharge from prosecution forever. The same is likely true of Petitioner. The lower court failed to properly consider these factors in its ruling.

Frankly, both the prosecutor's representation that the process to obtain Ms. Miller for trial and the State's subsequent reliance on it in its Response Brief are unsupported by any evidence except said representation and said representation is facially insufficient to prove that said process had begun.

Article IV(a) of the Agreement on Detainers provides:

"The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated: Provided, That the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request: Provided, further, that there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored..."

Accordingly, the request for custody must be approved and sent by the presiding judge which was never done in this case and does not appear in Ms. Miller's file. Accordingly, in actuality, the process was not properly begun and to this day has not been properly begun. Of course, it can't be now since there is no pending indictment.

The State further argues incorrectly that:

"Here the prosecutor clearly stated the salient facts and specific reasons for its motion to dismiss: that Petitioner's codefendant with whom he would be jointly tried (as Petitioner's motion to sever was denied) was unavailable at the time of trial. The State proffered not that its 'case is difficult and might be lost,' but, rather that without the codefendant's presence, the State was unable to proceed at this time."

Both prongs of that argument are incorrect.

First, the State specifically stated in its Motion to Dismiss that "the State is unable to prosecute this Defendant without testimony from his codefendant, Holly Miller." This statement was incorrect and really meant that the State was unable to "successfully" prosecute the Petitioner without her testimony. In any event, it was clearly an admission that the "case is difficult and might be lost."

Second, the State was not "unable to proceed at this time." It just didn't want to.

In short, there is nothing "salient" about said facts as they are incorrect and do not support a dismissal and they deny the Petitioner his right to trial. He was there and prepared to proceed to trial. All the lower court had to do was grant his Motion to Sever at that point and move forward with trial.

Without citing authority, the State claims:

“It is well within a circuit court’s discretion-acting in its capacity as guarantor of the public’s interest in the fair administration of justice-to allow the State to dismiss cases it has determined it cannot win, rather than to subject a criminal defendant to a jury trial.”

First, this is a factual admission, previously denied by the State, that the prosecutor did, in fact, seek this dismissal because it had determined it couldn’t win.

Second, Petitioner disputes this allegation of law.

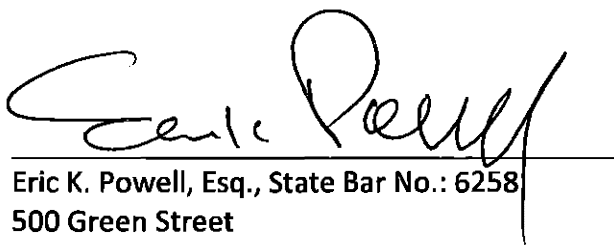
“In light of the foregoing law, we conclude that general statements by a prosecutor that a dismissal of criminal charges would effectuate the efficient and proper administration of justice are not specific enough to support the dismissal. Nor is it sufficient for a prosecutor to generally conclude that the case is difficult and might be lost, because uncertainty is inherent in any litigation. What is needed from a prosecutor is a statement of the salient facts and specific reasons that would provide a trial court with some basis for concluding that the dismissal of criminal charges is warranted...”  
Myers v. Frazier, supra.

Therefore, it is, in fact, not within a trial court’s discretion to dismiss a criminal case because the State has decided it cannot win. In its brief and as set forth above, the State has admitted that the prosecutor sought the dismissal because he did not think he could win. The Petitioner was present, prepared for trial and objected to the dismissal. Accordingly, the lower court granted the Motion to Dismiss in error.

### CONCLUSION

The Petitioner sought relief from the delays by filing an appropriate Motion to Sever specifically citing as his grounds that he wished to proceed to trial despite Ms. Miller’s absence.

The lower court could have and should have avoided this problem by simply granting said Motion but it refused to do so. Inexplicably, the lower court refused to hear the Motion to Sever the first time it was brought on because Ms. Miller and her counsel were not present. At the same time, however, he granted the State's Motion to Continue the trial in the same hearing and likewise in Ms. Miller's absence and her counsel's absence. This Court has made it clear that a Motion to Continue is a critical stage of the proceeding at which the Defendant has both the right to be present and the right to be represented by counsel. Subsequently, at the hearing on the Motion to Dismiss, the lower court again deferred to the State's position without properly assessing its Motion to Dismiss or considering its effect on Petitioner's rights. Under these and all of the circumstances set forth above, the granting of the Motion to Dismiss without prejudice was not consonant with the public interest in the fair administration of justice. The ruling of the lower court should be modified to show a dismissal with prejudice as to Petitioner's case.



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